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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~556~~ 202

OLIVER P. COBB, THOMAS FOLBRE, PETER W. WILLIAMS, LOUIS FOULKE, AND JAMES W. CHRISTY, PLAINTIFFS IN ERROR,

vs.

EMORY FAY AND SAMUEL L. LORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED DECEMBER 7, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 356.

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1 Pleas of the Circuit Court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and sixty-seven, before the honorable Samuel H. Treat, judge of the District Court of the United States for the southern district of Illinois, especially appointed to hold said Circuit Court, as by the record of his appointment more fully appears.

EMORY FAY AND SAMUEL L. LORD
v.
OLIVER P. COBB, THOMAS FOLBRE, Louis Foulke, J. Wallace Christy, and Peter Williams. } Assumpsit.—690.

Be it remembered, that heretofore, to wit, on the 12th day of May, A. D. 1865, before the honorable David Davis, one of the associate justices of the Supreme Court of the United States, and the honorable David McDonald, district judge of the United States for the district of Indiana, judges of said court, the following proceedings in the above-entitled cause were had, to wit: Come now the said plaintiffs in open court and filed their declaration herein in the words
2 and figures following, to wit:

In the Circuit Court for the district of Indiana, May term, A. D. 1865.

UNITED STATES OF AMERICA:

Emory Fay and Samuel L. Lord, citizens of the State of Illinois, and partners doing business under the name, firm, and style of E. Fay & Co., plaintiffs in this case, complain of Oliver P. Cobb, (a citizen of the State of Indiana,) Thomas Folbre, (a citizen of the State of Ohio,) Louis Folke, (a citizen of the State of Ohio.) Peter W. Williams, (a citizen of the State of Indiana,) and J. Wallace Christy, (a citizen of the State of Ohio,) partners doing business under the name, firm, and style of O. P. Cobb, Christy & Co., defendants of a plea of trespass on the case on premises.

For that whereas heretofore, to wit, on the first day of May, A. D. 1865, to wit, at the district of Indiana, aforesaid, the said defendants, as partners as aforesaid, were indebted to the said plaintiffs, as partners as aforesaid, in the sum of twenty-five thousand dollars for the price and value of divers goods, wares, and merchandise and corn and oats before that time bargained and sold by the said plaintiffs to the said defendants, at their special instance and request; and in
3 the further sum of twenty-five thousand dollars for the price and value of divers goods, wares, and merchandise and corn and oats before that time, bargained and sold and delivered by the said plaintiffs to the said defendants at their like special instance and request; and in the further sum of twenty-five thousand dollars for the price and value of work then and there done, and materials

the same provided by the plaintiff's for the defendant's, at their like special instance and request; and in the further sum of twenty-five thousand dollars for so much money then and there lent by the said for plaintiffs to the said defendants, at their like special instance and request; and in the further sum of twenty-five thousand dollars for so much money then and there paid by the plaintiffs for the use of the said defendants, at their like special instance and request; and in the further sum of twenty-five thousand dollars for so much money then and there had and received by the
4 said defendants to the use of said plaintiffs; and in the further sum of twenty-five thousand dollars for interest due from the said defendants to the said plaintiffs, for and in respect of said plaintiffs having forborne and given day of payment of money due from the defendants to the plaintiffs, at the defendants like special instance and request, for a long time then elapsed; and in the further sum of twenty-five thousand dollars for so much money found to be due and owing from the said defendants to the said plaintiffs on an account then and there stated between them; and whereas the said defendants afterwards, to wit, on the day and year, aforesaid, and at the district aforesaid, being so indebted and liable to pay, and in consideration thereof, undertook and then and there faithfully promised the the said plaintiffs to pay them the said several sums of money, aforesaid, when they. the said defendants, should be thereunto afterwards requested.

5 Yet the said defendants have wholly disregarded their said promises and undertakings aforesaid, and have not paid the several sums of money, aforesaid. nor any of them, nor any part of them, although often requested to pay the same; but so to do have hitherto wholly failed, and refused and still do fail and refuse, to the damage of the said plaintiffs in the sum of twenty-five thousand dollars; and therefore they bring suit, &c.

R. E. WILLIAMS,
Att'y for Pl'fs.

And also a bill of particulars in these words and figures, to wit:

Mess. O. P. Cobb, Christy & Co. in account current with E. Fay & Co.

January 26.	To one car corn, No.	2,730,	375.42 bus., *a* 100c. pr. bus	375 75
27.	Do.	do.	1,516, 373.12 bus., *a* 100c. pr. bus.	373 21
28.	Do.	do.	2,317, 370.13 bus., *a* 100c. pr. bus.	370 23
	Do.	do.	2,200, 380.05 bus., *a* 106c. pr. bus	402 90
	Do.	do.	2,462, 375.10 bus., *a* 106c. pr. bus.	397 70
30.	Do.	do.	3,088, 376.28 bus., *a* 106c. pr. bus.	399 09
	Do.	do.	3,142, 380 16 bus., *a* 106c. pr. bus.	403 10
	Do.	do.	1,358, 385.28 bus., *a* 106c. pr. bus.	408 63
31.	Do.	do.	2,402, 365.11 bus., *a* 106c. pr. bus.	387 13
	Do.	do.	2,016, 385 09 bus , *a* 106c. pr. bus.	408 28
	Do.	do.	1,744, 370.17 bus , *a* 106c. pr. bus.	392 56
	Do.	do.	2,693, 381 05 bus., *a* 106c. pr. bus.	403 96
	Discount on sight dr'ft of $4,000			20 00
	Do.	do.	$2,000	10 00
February 1.	Do.	do.	$2 000	10 00
6, 2.	To one car corn, No.	2,608,	368.14 bus., *a* 106c. pr. bus	390 34
6,	Do.	do.	1,176, 370.46 bus., *a* 106c. pr. bus.	392 95
	Forward			5,545 82

		Brought forward	5,545 83
February		Do. do. 254, 371.08 bus., *a* 106c. pr. bus.	393 41
	7.	Discount on dr'ft of $300	15 00
	9.	one car corn, No. 1,330, 382.18 bus., *a* 106c. pr. bus.	405 26
		Do. do. 1,540, 384.06 bus., *a* 106c. pr. bus.	407 16
	11.	Do. do. 3,028, 385.30 bus., *a* 106c. pr. bus.	408 67
	20.	Do. oats, No. 1,534, 591.15 bus., *a* 85c. pr. bus.	502 71
		Do. do. 2,935, 604.20 bus., *a* 85c. pr. bus.	513 89
	22.	Discount on dr'ft of $1,000	5 00
	27.	one car oats, No. 1,584, 580. bus., *a* 85c. pr. bus	493 00
		Do. do. 604.29 bus., *a* 85c. pr. bus.	513 89
		Do. do. 607.15 bus., *a* 85c. pr. bus.	516 31
Mar.	4.	Do. do. 607.12 bus., *a* 85c. pr. bus.	516 24
		Do. do. 605.05 bus., *a* 85c. pr. bus.	514 37
		one car corn, No. 432, 400.30 bus., *a* 106c. pr. bus.	424 56
		Do. do. 274, 387.28 bus., *a* 106c. pr. bus.	410 75
		Do. do. 1,042, 397.33 bus., *a* 106c pr. bus.	421 44
March	14.	To one car corn, No. 448, 376.14 bus., *a* 106c pr. bus.	398 28
		Do. do. 2,316, 368.42 bus., *a* 106c. pr. bus.	390 87
		Do. do. 2,055, 375.47 bus., *a* 106c. pr. bus.	398 39
		Do. do. 1,262, 375.34 bus., *a* 106c. pr. bus.	398 14
	15.	Do. do. 150, 405.49 bus., *a* 106c. pr. bus.	430 22
	17.	Do. do. 196, 401.54 bus., *a* 106c. pr. bus.	426 08
	20.	Do. do. 2,803, 372.43 bus., *a* 106c pr. bus.	395 12
	22.	Do. do. 2,774, 393.32 bus., *a* 106c. pr. bus.	417 18
7	29.	Do. do. 944, 379.04 bus, *a* 106c. pr. bus.	401 81
		Do. do. 3,120, 388.84 bus, *a* 106c. pr. bus.	411 36
	30.	Do. do. 2,811, 382.28 bus., *a* 106c. pr. bus.	405 45
		Do. do. 2,689, 391 49 bus., *a* 106c. pr. bus.	415 38
	31.	Do. do. 1,038, 392 17 bus., *a* 106c pr. bus.	415 84
		Do. do. 544, 380. bus., *a* 106c. pr. bus.	402 80
		Do. do. 2,593, 390.23 bus., *a* 106c. pr. bus.	413 83
		Do. do. 1,168, 379.47 bus., *a* 106c. pr. bus.	402 63
		Do. do. 2,611, 380.25 bus, *a* 106c. pr. bus.	403 27
April	3.	Do. do. 1,574, 379 bus., *a* 106c. pr. bus.	401 74
		Do. do. 1,282, 393.12 bus, *a* 106c. pr. bus.	416 61
		Do. do. 826, 386.04 bus., *a* 106c. pr. bus.	409 24
		Do. do. 1,892, 406.19 bus., *a* 106c. pr. bus.	430 66
		Do. do. 982, 418.17 bus., *a* 106c. pr. bus.	443 40
	4.	Do. do. 1,942, 381.09 bus., *a* 106c. pr. bus.	404 03
		Do. do. 1,818, 377.48 bus., *a* 100c. pr. bus.	400 52
		Do. do. 2,109, 413.32 bus., *a* 106c. pr. bus.	438 39
		Do. do. 2,100, 412.50 bus., *a* 106c. pr. bus.	437 72
		Do. do. 2,653, 395.20 bus, *a* 106c. pr. bus.	419 08
		Do. do. 1,284, 377.28 bus., *a* 106c. pr. bus.	400 15
		Do. do. 202, 373.02 bus., *a* 106c. pr. bus.	395 41
	5.	Do. do. 2,391, 286.34 bus., *a* 106c. pr. bus.	409 80
		Do. do. 2,645, 366.24 bus, *a* 106c. pr. bus.	388 41
		Do. do 888, 362.03 bus., *a* 106c. pr. bus.	383 77
		Do. do. 1,652, 379 36 bus., *a* 106c. pr. bus.	402 42
April	5.	Do. do. 2,914, 390.15 bus., *a* 106c pr. bus.	413 62
		Do. do. 2,325, 394 bus., *a* 106c. pr. bus.	417 64
8		Do. do. 3,045, 380.23 bus., *a* 106c. pr. bus.	403 24
		Do. do. 1,800, 393.54 bus., *a* 106c. pr. bus.	417 60
		Do. do. 3,072, 378.52 bus., *a* 106c. pr. bus.	401 23
		Do. do. 864, 375.40 bus., *a* 106c. pr. bus.	398 25
	6.	Do. do. 250, 390. bus., *a* 106c. pr. bus.	413 40
		Do. do. 288, 382.18 bus, *a* 106c. pr. bus.	405 26
		Do. do. 620, 384.48 bus., *a* 106c. pr. bus.	405 83
		Do. do. 662, 395 bus., *a* 106c. pr. bus.	418 70
		Do. do. 1,764, 388.22 bus., *a* 106c. pr. bus.	411 88
		Do. do. 910, 368.42 bus., *a* 106c pr. bu.	390 88
		Do. do. 3,015, 356.40 bus, *a* 10 6c. pr. bsus.	378 19
		Forward	39,791 28

		Brought forward			30,791 26
April		Do.	do.	2,783, 376.14 bus , a 106c. pr. bus.	398 82
		Do.	do.	590, 375.24 bus., a 106c. pr. bus.	397 97
		Do.	do.	102, 387.28 bus., a 106c. pr. bus.	410 75
		Do.	do.	2,629, 383.37 bus., a 106c. pr. bus.	406 68
	7.	Do.	do.	428, 400. bus., a 106c. pr. bus.	424 00
		Do.	do.	2,293, 388.40 bus., a 106c. pr. bus.	412 04
		Do.	do.	3,099, 387.17 bus., a 106c. pr. bus.	410 54
		Do.	do.	1,698, 394.46 bus., a 106c. pr. bus.	418 51
		Do.	do.	830, 370.28 bus., a 106c. pr. bus.	392 73
	8	Do.	do.	2,685, 394. bus., a 106c. pr. bus.	417 64
		Do.	do.	2,551, 376.44 bus., a 106c. pr. bus.	399 39
		Do.	do.	2,915, 388.43 bus., a 106c. pr. bus.	412 09
		Do.	do.	2,677, 385.35 bus., a 106c. pr. bus.	408 76
		Do.	do.	1,766, 386.25 bus., a 106c. pr. bus.	409 63
		Discount on five day dr'ft of		$2,000	20 00
		Do.	do.	$2,000	30 00
		Do. ten	do.	$2,000	20 00
		Do. ten	do.	$2,000	20 00
9		Forward			$36,591 43

Cr.

January	27.	By dr'ft		4,000 00	
	31.	Do.		2,000 00	
February	1.	Do.		2,000 00	
	7.	Do.		3,000 00	
	22.	Do.		1,000 00	
March	23.	Do.		2,000 00	
April	5.	Do.		4,000 00	
		Do.		2,000 00	
					$20,000 00
		Bal. due			$16,591 43

And afterwards, to wit, at the May term of said court, on the 16th day of June, A. D. 1867, before the honorable David McDonald aforesaid, the following further proceedings in the above-entitled cause were had, to wit: continued to the next term of this court.

And afterwards, to wit, at the November term of said court, on the 13th day of November, A. D. 1865, before the honorable judges aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the defendants, by their attorneys, and file a plea in
10 abatement to the plaintiffs declaration.

And afterward, to wit, at the term last aforesaid of said court, on the 16th day of November, A. D. 1867, before the honorable David Davis aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the plaintiffs, by their attorneys, Mess. Williams & Porter, and on their motion leave is granted by the court to make Peter W. Williams a defendant to this action; and on their motion an alias summons is ordered to issue herein, and this cause is continued.

And afterwards, to wit, at the November term aforesaid of said court, on the 2d day of December, A. D. 1865, before the honorable

David McDonald aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the plaintiffs, and upon their motion leave is given to them to retake the depositions of the witnesses whose depositions were taken on their behalf before Peter W. Williams was made a defendant to this action, to wit: the depositions of Hugh N. Schouler,
11 Colin Robinson, Charles A. Phelps, Iretus R. Krum, John Filger, Alexander Hawthorne, Daniel B. Webster, John Brevoort, Smith Johnson, John W. Phipps, Ebenezer H. Rood, Leander H. Aldrich, James Grant, Edward Lukes and Christian Metzger, Theodore T. Gurney, and William R. Arthur; and the plaintiffs have leave to withdraw the depositions so heretofore taken on their behalf.

And afterwards, to wit, at the May term of said court, on the 1st day of May, A. D. 1866, before the honorable David McDonald aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Albert G. Porter, esq., and on his motion the depositions on file in this case are ordered to be published.

And afterwards, to wit, at the May term aforesaid, on the 2d day of May, A. D. 1866, before the honorable judges aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the plaintiffs, by Mess. Porter, Harrison & Fishback, their attorneys, and upon their motion the said defendants are ruled to plead herein on or before the fifth day of the present term.

12 And afterwards, to wit, at the May term aforesaid of said court, on the 4th day of May, A. D. 1866, before the honorable judges aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by T. D. Lincoln, esq., their attorney, and file an affidavit herein, and thereupon move the court for a continuance of this cause.

And afterwards, to wit, at the May term aforesaid of said court, on the 5th day of May, A. D. 1866, before the honorable David Davis, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by Mess. Lincoln, Smith & Warnock, and Honorable W. S. Holman, their attorneys, and file their pleas to the action, which are in the words and figures following, to wit:

In the Circuit Court of the United States for the district of Indiana.

EMORY FAY *et al.*
vs.
OLIVER R. COBB *et al.* } In assumpsit.

Now come the said defendants, by their attorneys, and defend, &c., and for plea to the said plaintiffs' declaration say, that they

13 promise in manner and form as the said plaintiffs have thereof above, in their said declaration, complained against them, and of this they put themselves upon the country.

2. And for a second plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiffs ought not to have or maintain their said action against them, because they that neither of the said supposed contracts, promises, and undertakings in the said plaintiffs' declaration mentioned, was ever reduced to writing, nor was any note or memorandum of, touching, or concerning the same, or either of them, made in or reduced cerning the same, or either of them, made in or reduced to writing, to writing, and signed by either the plaintiffs or defendants; nor was any note or memorandum in writing, signed by either of said parties, ever made of any contract, bargain, or agreement between said parties, of or concerning the said goods, wares, and merchandise in said declaration mentioned, or of or concerning the sale or purchase thereof, or of any part thereof; nor was any money or other thing of value ever given by said defendants to said plaintiffs in earnest, to bind any bargain concerning the same, or any part thereof, or any pay-
14 ment whatever ever made thereon, or on the purchase money thereof by defendants to the plaintiffs; nor was any part of said goods, wares, and merchandise in any or either of said counts, or contracts, or promises mentioned, ever delivered by the said plaintiffs to the said defendants—the value of the goods, wares, and merchandise in each of said counts, and in each of said supposed contracts or undertakings mentioned, exceeding the sum of fifty dollars. Wherefore the said defendants say that said supposed contracts, promises, and undertakings were and are void; and this they will verify.

LINCOLN, SMITH & WARNOCK,
WM. S. HOLMAN,
Def'ts' Att'ys.

And afterwards, to wit, at the term last aforesaid of said court, on the 7th day of May, A. D. 1866, before the honorable judge aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and
15 the court being sufficiently advised, do now order that this cause be continued until the next term of the court, at the costs of the the plaintiff, on the terms that the said defendants, Williams & Christy, waive all such objections to the depositions taken and filed in the cause as may be founded on the circumstance that when said depositions were taken said defendants had not been served with process in this case.

And afterwards, to wit, at the November term of said court, on the 7th day of November, A. D. 1866, before the honorable Judge McDonald, aforesaid, the following further proceedings in the above-entitled cause, were had, to wit:

Come now the plaintiffs by their counsel, and on their motion the depositions on file in this court are ordered to be published.

And afterwards, to wit, at the term last aforesaid of said court, on the 14th day of November, A. D. 1866, before the honorable Judge

McDonald, last aforesaid, the following further procceedings in the above-entitled cause were had, to wit:

16 Come now the parties, by their respective attorneys, and by agreement this cause is set for trial on the 21st inst.

And afterwards, to wit, at the November term, last aforesaid, of said court, on the 26th day of December, A. D. 1866, before the honorable Judge McDonald, last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and the court being now advised, do sustain the said demurrer to the said second plea by the defendants above pleaded.

And afterwards, to wit, at the November term, last aforesaid, of said court, on the 27th day of December, A. D. 1866, before the honorable Judge McDonald, last aforesaid, the following further proceedings in the cause above-entitled, were had, to wit: Ordered by the court that the cause above entitled, by agreement of parties, be continued to the second Tuesday of March next.

17 And afterwards, to wit, at the November term, last aforesaid, on the 12th day of March, A. D. 1867, before the honorable Judge McDonald, last aforesaid, the following further proceedings in the above-entitled cause were had, to wit: Ordered by the court that all depositions filed in this cause, and to be filed therein, be published without further order.

And afterwards, to wit, at the November term of said court, on the 13th day of March, A. D. 1867, before the honorable David McDonald, aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their attorneys, and the plaintiffs now file their replication herein, as follows, to wit:

And for further replication, in this behalf, as to the plea of the said defendants, by them secondly above pleaded, the plaintiffs say that they, said plaintiffs, by reason of anything by said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against said defendants, because

18 they say that before the commencement of this suit the defendants paid to the plaintiffs a large sum of money, to wit, eighteen thousand dollars, in part payment of said several sums of money in the declaration mentioned, and in part payment for the goods, wares, and merchandise bargained and sold, and in part payment for the goods, wares and merchandise sold and delivered by the plaintiffs to the defendants, as in the declaration mentioned; and the plaintiffs further say, that said goods, wares, and merchandise, in the declaration, were delivered by the plaintiffs to the defendants before the commencement of this suit, and this the said plaintiffs pray may be inquired of by the country, &c.

PORTER, HARRISON & FISHBACK,
Att'ys for Pl'ffs.

And the defendants do the like.

LINCOLN, SMITH & WARNOCK,
And H'KS, HORD & H'KS,
For Defendants.

And the plaintiffs now, also, file their motions, in writing,
19 to suppress certain depositions, and parts of depositions, therein named.

And afterwards, to wit, at the term aforesaid, of said court, on the 14th day of March, A. D. 1867, before the honorable Judge McDonald, aforesaid, the following further proceedings in the above-entitled cause were had, to wit: Come now the parties, by their respective attorneys, and the plaintiffs now file their further motion, in writing, to suppress certain depositions, and parts of depositions, on file herein; and at the same time said defendants file, also on their part, a motion in writing, to suppress certain depositions, and parts of depositions herein.

And it is ordered by the court that a full list of all depositions in this cause be prepared by the clerk, and filed with the papers in the cause.

And afterwards, to wit, at the term last aforesaid of said court, on the 15th day of March A. D. 1867, before the honorable Judge McDonald, last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

20 Now come the parties, by their respective attorneys, and the defendants now file their motion in writing, to suppress the deposition of Elihu Fallis herein.

And the defendants, also, by counsel, move the court that the plaintiffs do make their election between the several replications by them filed to the pleas of the defendants, by which whereof they will abide; which motion is granted; and thereupon the plaintiffs, by counsel, in open court, elect to abide by the second replication by them herein filed.

And afterwards, to wit, at the term last aforesaid of said court, on the 16th day of March, A. D. 1867, before the honorable Judge McDonald, aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now said defendants, by counsel, and file their further motion in writing to suppress certain depositions, and parts of depositions, on file in this cause.

And afterwards, to wit, at the November term of said court,
21 on the 20th day of March, C. D. 1866, before the honorable Judge, last aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and thereupon said defendants file their further motion herein to suppress certain depositions, and parts of depositions filed on behalf of the plaintiffs, in this cause.

And the defendants at the same time, file the affidavits of James W. Warnock, Thomas A. Hendricks, and Abraham W. Hendricks, for a continuance of this cause, and do now move the court to continue the same to the next regular term.

And said motion having been heard, it is ordered that this cause be so continued, and that the defendants do pay all costs herein of the present term from its commencement, in November last, on or before the first day of the next May term.

And afterward, to wit, at the May term of said court, on the 13th day of May, A. D. 1867, before the Honorable S. H. Treat,
22 judge as aforesaid of the said court, the following further proceedings, in the above-entitled cause, were had, to wit:

Now come the parties by their respective attorneys, and this cause coming on to be tried, here comes a jury, to wit, J. N. Patterson, R. C. Hammond, James Sewall, Charles G. Powell, Leander Chipman, W. H. H. Lewis, William Worthington, Oliver B. Stout, William J. Gibson, David Cain, Silas Stewart and Baldwin Riley, who being tried and sworn to try the issue joined aforesaid, and having heard a part of the evidence, are by permission of the court allowed to separate until the meeting of the court, on to-morrow morning.

And afterwards, to wit, at the May term of said court last aforesaid, on the 14th day of May, A. D. 1867, before the honorable Judge Treat last aforesaid, the following further proceedings, in the above-entitled cause, were had, to wit:

Come now the parties by their respective attorneys, and the jurors of the jury come also, and having further heard the evidence
23 in this cause, are by permission of the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the term aforesaid of said court, on the 15th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceedings, in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and the jurors empanneled and sworn, in this cause, come also, and having further heard the evidence in this cause, are allowed by the court to separate until the cause on to-morrow morning.

And afterwards, to wit, at the term aforesaid of said court, on the 16th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceedings, in the above-entitled cause, were had, to wit: Now come the parties, by their respective attorneys, and the jurors of the jury heretofore empannelled and sworn in this cause come also, and having further heard the evidence herein, are allowed by the court to separate until the
24 calling of the cause on to-morrow.

And afterwards, to wit, at the May term aforesaid of said court, on the 17th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceedings, in the above-entitled cause, were had, to wit:

Come now the parties by their respective attorneys, and upon motion of the plaintiffs and proof of notice, it is ordered by the court, that by Monday morning next, the defendants produce and submit to the inspection of the plaintiffs the letter-press copies of the said defendants, letters to E. Fallis, relating to negociations for the purchase and difficulties that grew out of the purchase of grain by said Fallis for Cobb, Chirsty & Co., in the winter of 1865.

And now also come the jurors of the jury heretofore empannelled

and sworn in this cause, and having further heard the evidence herein, are allowed by the court to separate until the calling of the cause on to-morrow morning,

And afterwards, to wit, at the May term aforesaid of said court, on the 11th day of May, A. D. 1867, before the hon. Judge
25 Treat aforesaid, the following further proceedings, in the above-entitled cause; were had, to wit:

Come now the parties by their respective attorneys, and now also come the jurors of the jury empannelled and sworn in this cause, and having further heard the evidence herein, are allowed by the court to separate until the the calling of the cause, on Monday morning next. And afterwards, to wit, at the May term aforesaid of said court, on the 20th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceedings, in the above-entitled cause, were had, to wit:

Come now the parties by their respective attorneys, and the jurors of the jury empannelled and sworn in this cause, come also, and having further heard the evidence herein, are allowed by the court to separate until nine o'clock, to-morrow morning.

And afterwards, to wit, at the May term of said court, on the 21st day of May, A. D. 1867, before the honorable Judge Treat
26 aforesaid, the following further proceedings, in the above-entitled cause, were had, to wit:

Come now the parties by their respective attorneys, and now come also the jurors of the jury heretofore empannelled and sworn in this cause, and having further heard the evidence herein, are allowed by the court to separate until to-morrow morning, at nine o'clock.

And afterwards, to wit, at the May term aforesaid of said court, on the 22d day of May, A. D. 1867, before the honorable Judge aforesaid, Judge Treat, the following further proceedings, in the above-entitled cause, were had, to wit:

Come now the parties by their respective attorneys, and now also come the jurors of the jury heretofore empannelled and sworn in this cause, and having further heard the evidence in this cause, are allowed by the court to separate until nine o'clock, to-morrow morning.

And afterwards, to wit, at the May term aforesaid of said court, on the 23d day of May, A. D. 1867, before the honorable Judge
27 Treat afore, the following further proceedings, in the above-entitled cause, were had, to wit:

Come now the parties by their respective attorneys, and now also come the jurors of the jury in this cause heretofore empannelled and sworn, and having further heard the evidence herein, are allowed by the court to separate until to-morrow at nine o'clock.

And afterwards, to wit, at the May term of said court, on the 24th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceeding, in the above-entitled cause, were had, to wit:

Come now the parties by their respective attorneys, and the jurors of the jury heretofore empannelled and sworn in this cause come also, and having heard the residue of the evidence of the parties herein are allowed by the court to separte until the calling of the cause, on to-morrow morning.

And afterwards, to wit, on the May term of said court, on the 25th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceedings in the above-entitled
28 cause, were had, to wit:

Come now the parties by their respective attorneys, and now also come the jurors of the jury empannelled and sworn in this cause, and having heard in part the argument of counsel herein, are allowed by the court to separate until Monday morning next, at the hour of nine o'clock.

And afterwards, to wit, at the May term aforesaid of said court, on the 27th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceedings, in the above-entitled cause, were had:

Come now the parties by their respective attorneys, and now also come the jurors of the jury empannelled and sworn herein, who having further heard the argument of counsel in this cause, are allowed by the court to separate until to-morrow morning, at nine o'clock.

And afterwards, to wit, at the May term aforesaid of said court, on the 28th day of May, A. D. 1867, before the honorable Judge Treat aforesaid, the following further proceedings, in the
29 above-entitled cause, were had, to wit:

Comes now the parties by their respective attorneys, and now also come the jurors of the jury, heretofore empannelled in this cause, and having further heard the argument of counsel herein, are by the court allowed to separate until to morrow morning at nine o'clock.

And afterwards, to wit, at the May term aforesaid, of said court, on the 29th day of May, A. D. 1867, before the honorable Judge Treat, aforesaid, following further proceedings, in the above-entitled cause, were had, to wit:

Now comes the parties, by their respective attorneys, and the jurors of the jury aforesaid, come also, and having heard the argument herein concluded, are allowed by the court to separate until nine o'clock to-morrow morning.

And afterwards, to wit, at the May term aforesaid of said court, on the 30th day of May, A. D. 1867, before the honorable Judge, Treat, aforesaid, the following further proceedings in the above-entitled cause, were had, to-wit:

Come now the parties by their counsel, and the jury come
30 also; and having heard the charge of the court, do now return into court the following verdict: We the jury find for the plaintiffs, and assess their damage at eighteen thousand seven hundred and twenty dollars and twenty-three cents.

And the defendants now give notice of a motion for a new trial herein.

And afterwards, to wit, at the May term, aforesaid of said court, on the 31st day of day, A. D. 1867, before the honorable Judge Treat, aforesaid, the following further proceedings in the above-entitled cause, were had, to wit:

Now come the plaintiffs by Mess. Porter, Harrison, and Fishback, and Charles D. Coffin, esq., their attorneys; and the defendants also come by Mess. Lincoln, Smith, and Warnock, and Mess. Hendricks, Hord and Hendricks, their attorneys; and the defendants pursuant to notice given, now file their motion, in writing, for a new trial herein, in the words and figures following, to wit: and now come the defendants and move the court to grant a new trial for the following reasons:

31 First the court erred in admitting evidence objected to by the defendants.

Second. The court erred in refusing to receive the evidence offered by the defendants.

Third. The court erred in its charge to the jury.

Fourth. The court erred in refusing the several instructions asked by defendants.

Fifth. The verdict is against the evidence.

Sixth. The verdict is against the law of the case.

HENDRICKS, HORD and HENDRICKS.
LINCOLN, SMITM and WARNOCK.
Counsel for the Defendants.

And thereupon said motion is submitted, and overruled by the court now here.

And it is therefore considered by the court now here, that the said plaintiffs do recover of said defendants the said sum of eighteen thousand seven hundred and thirty dollars and twenty-three

32 cents, ($18,720 23,) together with the costs and charges by them in this behalf laid out and expended.

And the defendants now tender their bill of exceptions herein, which was signed, sealed, and ordered to be made part of the record, and the same follows in these words and figures:

Circuit Court of the United States for the district of Indiana.

EMERY FAY *et al*
v.
O. P. COBB *et al.*

Be it remembered that on the trial of this cause, at this term of the court, the plaintiffs to maintain the issue on their part, offered evidence tending to show that the plaintiffs sold and delivered the corn in question to the defendants through one Elisha Fallis, and that the said Fallis was, at the time, the agent of the defendants

33 to purchase the said corn, and generally to purchase corn and oats for defendants Indiana and Illinois, and among

other evidence upon this point was a large number of drafts drawn them by said Fallis, and which he used in paying for grain purchased in the vicinity of Galena, Bloomington and other points in Illinois, and drawn upon them in Cincinnati, Ohio, where this house did its business, and near which city the defendants resided, and which were paid by them, and which said drafts were signed "E. Fallis, agt.," and one of which is hereto attached, and made part hereof, marked A.

And also sundry letters written by one H. B. Weller, the corresponding clerk of the defendant, at Cincinnati, Ohio, in the name of defendants, which he was authorized to sign in the general course of business, which were copied by on their letter book, and were addressed to said Fallis, under the title or designation of "E. Fallis, agt."

They, also, offered evidence tending to show and claimed they had shown that the said Fallis's operations, as such agent, commenced about the 10th day of August, 1864, and continued
34 until some time in March following, and that his purchases were made principally at Dubuque, Iowa, Galena, Bloomington, El Paso, and other points on the Illinois Central railroad, and in the vicinity of El Paso, at which latter point he had his headquarters.

But there was no evidence tending to show that the said Fallis was engaged in making any such purchases in Chicago or in its immediate vicinity, but there was evidence tending to show that he was a general agent to buy in Indiana and Illinois, at such places as he might choose; and among other evidence the plaintiff offered in evidence the letter written by the said Weller, and addressed to Bates & Stone, commission house at Chicago, dated Dec. 31st, 1864, and a copy of which, marked B, is hereto attached, and made a part hereof.

It was admitted by the defendant's counsel, that said Weller was all the time the corresponding clerk of the defendants, and that the letter was copied by him on the defendant's letter book, but
35 there was no other evidence tending to show that the letter ever came to the knowledge of the plaintiffs, except that copies were kept in the letter-press book of defendants; and Christy, one of defendants, frequently gave instructions relative to business correspondence, or ever came to the actual notice of defendants, or had any connexion with any grain purchased by said Fallis, but to grain purchased by the defendants, of said Bates & Stone.

And it was shown that Chicago, where Bates and Stone had their house, was some 200 miles from Bloomington, where the plaintiffs did business, and claimed to have sold the corn, which was the subject of this suit.

And thereupon the defendants objected to the receipt of the said letter, as evidence in the case, because it had no relation to the grain purchased by said Fallis, or ever came to the knowledge of the plaintiffs, or that they ever heard of it, and because it did not appear that the defendants knew of the writing thereof, and because it has nothing to do with this case.

36 But the court admitted it as an admission of the defendants, and because their knowledge of it was presumed from the fact that a copy thereof was found in their letter-press copy book, and because it was in name of defendants, and written by their corresponding clerk, to which admission the counsel for the defendants at the time excepted, and their exception was allowed and made part of the record in this case.

And further to maintain the issue on his part, the plaintiffs offered and read in evidence so much of the deposition of Wm. H. Snyder as is marked C.

And the defendants objected to the answer to question No. 13, in the said deposition, which is in these words, to wit:

"In the fall or winter of 1864, Mr. Fallis applied to me to discount his drafts on O. P. Cobb, Christy, & Co., to the amount of several thousand dollars, representing himself as their agent, in confirma-

37 tion of which statement he produced a letter from O. P. Cobb, Christy & Co., authorizing him to draw upon them, and stating that his drafts would be paid; not being acquainted with the parties, I declined discounting them, unless he would get an endorser in town, which he declined to do," for the reason that it purported to give the contents of a letter, without producing it, or accounting for its absence; but the court overruled the said objection, and admitted the said evidence, to which overruling of the said objection the defendant's counsel excepted, and his exception was allowed, and made part of the record.

The said Fallis was present during all the trial, and there was no evidence offered by him in the case as to said letter, and no question asked him in reference thereto. The said deposition, so far as it relates to this letter, is hereto attached, and marked C, and made part hereof.

And to further maintain the issue on their part, the plaintiffs offered and read in evidence so much of the deposition of John

38 Fagan, taken by defendants, as relates to said Weller, which is in the words and figures set out in paper, and is here attached and marked D, and made part hereof.

They also gave evidence tending to show that Mr. Fallis had purchased 30,000 bushels of oats of said Fagan for defendants, and given his draft for $6,000 upon defendants in part payment thereof.

And the defendants objected to the statements and declarations made by said Weller, because they relate to another and a different transaction than the one sued upon, and with a different party, and were not competent in this suit. But the court overruled the said objection, and admitted the said evidence, to which ruling the counsel for the defendants objected, and the objection was overruled, and exceptions taken to such overruling by counsel for def'ts, and made part of the record.

It was admitted that the said Weller was, at the time, one of

39 the defendant's clerks, and went to Galena for them, in reference to (advances made by Mr. Fallis on) the oats sold to said Fallis by said Fagin.

And the defendants gave evidence tending to show that on or about the 13th of Aug., 1864, at Cincinnati, Ohio, they entered into an agreement to purchase grain of Mr. Fallis during the coming fall and winter, such as is set out in the agreement hereto attached and marked E, and made part hereof; that this agreement was made by Mr. O. P. Cobb and Mr. Christy, of the firm of O. P. Cobb, Christy & Co.; that at the same time and place, and in the same conversation, it was agreed between said Fallis and said Cobb, and one E. Q. Blaidsdell, that the same arrangement was to exist between him and Cobb, Blaisdell & Co., of Cairo, Illinois, which firm was composed of said Cobb and said Blaisdell, and one A. A. Arrick, then absent, provided said Arrick, upon having the same presented to him, assent thereto, at that the parties were to meet in a few days in
40 St. Louis, and have the same submitted to said Arrick; that on or about the 30th of Aug. following, the said parties, Cobb, Blaisdell, Arrick, and Fallis, did meet at St. Louis, and the said agreement was submitted to said Arrick, and he assented to the same as an arrangement between the said Fallis & Cobb, Blaisdell & Co.; that the agreement between Cobb, Christy & Co., & Fallis, was completed at Cincinnati, Ohio, provided said Fallis would go on for that firm alone, but that he was absolutely bound to O. P. Cobb, Christy & Co., unless the firm of Cobb, Blaisdell & Co. also made the same arrangement upon consultation with said Arrick.

And the defendants also offered evidence tending to show that the said agreement marked E was, on the 13th or 14th of March, 1865, while the business was going on, reduced to writing, and signed by the said Fallis, & O. P. Cobb Christy & Co., of Cincinnati, Ohio.

And the said E. S. Blaisdell having been examined as a witness by the (plaintiffs) and having testified in chief that an agreement,
41 such as that contained in the said writing marked E, was entered into in Aug., 1864, at Cincinnati, for the house of O. P. Cobb, Christy & Co., and that the same arrang[ange]ment was, at the same time, agreed to for the house of Cobb, Blaisdell & Co., provided his partner should assent thereto, and that they were to meet and submit the arrangement to said Arrick at St. Louis; and that such meeting was had at St. Louis, about the 30th day of August, when the same was submitted to said Arrick, and he assented thereto.

The plaintiff, on cross-examination, asked the said Blaisdell if Fallis was not agent of Cobb, Christy & Co., during the fall and winter, to which he replied he was not.

They then presented him with a letter dated Dec. 8th, 1864, and addressed to Robert Forsythe, by the house of Cobb, Blaisdell & Co., and a copy of which is marked F, and made part hereof, and asked whose handwriting it was in, and he replied that it was the
42 of his partner and Mr. Arrick; that he had no other knowledge of the letter, but it was in their letter-press book.

The plaintiff offered the letter in evidence, and the defendant's counsel objected to the same because Mr. Arrick's attention was not called to the matter, and because it was not competent between these parties; but the court admitted it on the ground that the defendants

had given evidence that the same arrangement had been agreed upon for the house of Cobb, Blaisdell & Co., and continued while he was purchasing, and had been submitted to Arrick at St. Louis, and he had assented thereto, and that said letter was admissible to proove that such was not the arrangement between F. & said C. & Co., and then instructed the jury that said letter was not evidence for any other purpose, and which admission of the said letter counsel
43 for the defendants excepted to; this exception, was allowed and made part of the record.

And the plaintiff also produced a letter signed by Cobb, Blaisdell & Co., dated Dec. 9, 1864, addressed to Col. Myers, a copy of which is attached marked G, and made part hereof; and the witness was asked in what handwriting the said letter was, and he replied that he knew nothing of the letter, but it was in the handwriting of Mr. Arrick, his partner; that he, the witness, had no knowledge of it until he saw it in their letter-press book not long since.

The plaintiffs thereupon offered the said letter in evidence. and the counsel for the defendants objected to the admission of said letter for the same reasons stated in the objection to the letter written to said Forsyth; but the court overruled the said objection on the same ground stated as above in reference to the
44 Forsyth letter, and admitted the letter in evidence, to which overruling the said objection the counsel for the defendants excepted, and the exception was allowed and made part of the record.

One of the important and principal points of the case was, whether Fallis was the agent for O. P. Cobb, Christy & Co. in these transactions, or whether he was furnishing them grain under the agreement heretofore referred to and marked E, the plaintiffs offering evidence tending to show and claimed that they had shown that the said Fallis was the agent of the defendants in purchasing grain as aforesaid, and that the agreement marked E was not the arrangement or agreement between the parties, but subsequently drawn up, and the defendants offering proof tending to show and claimed that they have shown that the said agreement between the defendants and said Fallis.

And the plaintiffs offered evidence tending to show and
45 claimed that they had shown that the defendants had held the said Fallis out to the world as their agent, and that they were bound by his act as such agent, whether he was such or not.

And among other proof and evidence offered and relied upon as such holding out was the letters above referred to, and the term "ag't."

The plaintiffs also offered evidence tending to show that the said Fallis held himself out to the plaintiffs, at the time the sale was made to the said Fallis by the plaintiffs, (that he represented himself,) as agent of the defendants.

The defendants also offered evidence tending to show that the term "ag't," signed by Mr. Fallis to his name, and used in the address to him, was explained by him to the defendants, and they

understood that term to mean that Mr. Fallis was, in these transactions, using his wife's money, and that he was using it to protect the said money, and that they understood it to mean that,
46 and no agency on their part; and that it was not used, so far as they knew, or for any interest on their part to create the belief that he was their agent.

There was also evidence tending to show, and the defendants claimed they had shown, that by the contract of sale the plaintiffs agreed to furnish, at a future time, merchantable corn, to be put in reserved gunnies, to be loaded on the cars; that it was purchased by the said Fallis to go Cairo, and there to be delivered to the government use, and that the defendants had no other or further use for it; that at the time of the sale of the corn in question, the plaintiffs knew the purpose and use for which it was purchased, and that he obtained the cars bound to Cairo, and delivered the corn in sacks upon the cars, and that he delivered the greater part of the corn in the absence of the said Fallis or the defendants; but Fallis was present on two or three occasions when corn was being loaded, and what he saw was satisfactory to him.

47 The evidence shows that the business house of the defendants was at Cincinnati, Ohio, and that the plaintiffs resided at Bloomington, in the State of Illinois, and that the contract for the sale of the grain to Fallis was made in Illinois; that there was no communication between the plaintiffs and defendants, either by letter or otherwise; that Bloomington is some 400 miles from Cincinnati; that by regular mail it would take about 20 hours to communicate with Cincinnati; but to get a reply from there to Bloomington, it would take about two days, and for a communication by telegraph it would take about two hours; that no such communication, either by letter or telegraph, passed between the plaintiffs and defendants prior to the sale of the grain in question, which was in the latter part of January; that no direct communication whatever, passed between plaintiffs and defendants until some time in April,
48 1865, when the grain market was much broken down.

There was evidence also offered by the defendants tending to show, and claimed that they had shown, that in April, 1865, there was a dispute between the plaintiffs and defendants and one Fallis, as to the character and quality of the grain in controversy and dispute. The grain might be submitted to the inspection of a Chicago inspector, and that so much of the grain as such inspector passed, the defendants would take and pay for, and so much as should not pass inspection of said inspector the plaintiffs should retain; that such inspector was obtained for the purpose of inspecting said grain, and entered upon the inspection thereof, and that thereupon the plaintiffs refused to abide by the said agreement.

There was also evidence offered by the defendants tending to show, and the defendants claim that it was proven, that the corn sued for was purchased by said Fallis, to be shipped to de-
49 fendants for the use of the United States, in the support of the army then in the field, and the plaintiffs, at the time of

the sale, knew that it was for such use; and the evidence tended to prove, and the defendants claimed that it was proven, that the corn shipped by the plaintiffs was not reasonably fit for the use and purpose so intended in the purchase.

1st. And the evidence being closed, the defendants asked the court to charge the jury that if the written paper in evidence, purporting to be the arrangement between O. P. Cobb, Christy & Co., and Fallis does not constitute the said Fallis, an agent to purchase grain, and if that was the arrangement under which Fallis went to Illinois, and was acting at the time of the contract with plaintiff was made, then they cannot recover upon the ground that Fallis was the agent for defendants.

But the court refused the charge in the language asked, but charged upon the same as is provided in the general charge
50 herein set out in full, to which refusal the counsel for the defendants excepted, and his exception was allowed and made part of the record.

2. The defendants also asked the court to charge the jury, that before the defendants can be bound that they held Fallis out to the world as their agent, it must appear that such holding out was by the defendants to the plaintiffs, and that the plaintiffs acted upon the faith of such holding out.

Which charge, the court refused as asked, but charged as contained in the general charge, to which refusal the counsel for the defendants excepted, and their exception and made part of the record in this case.

3. And the defendants asked the court to charge the jury, that the writing of letters by Weller, and 35 persons, at a distant place from the plaintiffs, and at other times, and relating to other transactions, and with no design to influence the plain-
51 tiffs in this or any other transaction cannot be treated as such holding out to the world, as to make the defendants liable in this case, especially if there is no evidence in the case showing that the plaintiffs, before the transaction in question, ever saw these letters, or acted upon the faith of the statement contained therein, which charge the court gave.

4. The defendants also asked the court to charge the jury, that before the plaintiffs could recover upon any ground that the defendants are liable, because they held Fallis out to the world as their agent, they must prove—

1st. That the defendants held him out as such agent to the plaintiffs.

2d. That such holding out was with the design, on the part of the defendants, to influence the plaintiffs.

3d. That the defendants, in making the contract in question, acted upon the faith of such representations so made by the defend-
52 ants, which charge the court refused as asked, but charged as in the general charge, to which refusal to charge as asked, the counsel for defendants excepted, and their exception was allowed and made part of the record in this case.

5. And the defendants asked the court to charge the jury, that Mr. Fallis could not, by his representations, authorize the plaintiffs to act upon the faith of such agency; that no such indefinite term as "ag't" could be held to create an estoppel, nor to the consent to its use affect the defendants; if it was understood by them not to refer to an agency for or on their account, which charge the court refused as asked, but charged as in the general charge; to which refusal to charge as asked, the counsel for the the defendants excepted, and his exception was allowed and made part of the record in this case.

6th. And the counsel for the defendants asked the court to
53 charge, that the jury find that the term "ag't" was not used so far as the defendants understood as an agency of Fallis for them, and was not permitted by them with the purpose and intent of creating belief that he was such agent; then it cannot be treated as creating any holding out to the world of Fallis as such agent, which charge the court refused, but charged as in the general charge; to which refusal to charge as asked, the counsel for the defendants excepted, and his exception was allowed and made part of the record.

7th. And the defendants asked the court to charge the jury, that if the corn in question was sold by the plaintiffs to Mr. Fallis, as merchantable sacked corn, they knowing at the time that it was purchashed to go to Cairo, and there to be delivered to the government, and that the defendants had no other use for it at Cairo; and if the plaintiffs were to procure the cars, select and deliver the corn at a time after the making of the contract, and they did procure the cars
54 bound for Cairo, and so loaded the cars in the absence of Fallis and the defendants, they were bound to furnish such sacked corn as was reasonably fit for that purpose, and if they did not, and it was refused on that account, the plaintiffs cannot recover, which charge the court refused to give; to which refusal the counsel for the defendants excepted, and their exception was allowed and made part of the record in this case.

8th. And the counsel for the defendants asked the court to charge the jury, that if it appears, that in April, 1865, there was a dispute between the plaintiffs and the defendants, and one Fallis, in reference the character and quality of the grain in question, and to settle the controversy, was agreed between the parties that the said grain should be submitted to the inspection of a Chicago inspector who was obtained for that purpose, and that the defendants should receive and pay for all the grain that the said inspector should pass
55 as No. 1 grain, and that the plaintiffs should retain all that did not pass; and if it further appears, that upon the obtaining of such inspector for said purpose, the defendants offered and were ready to perform such agreement, and that the plaintiffs refused to perform it, then they cannot recover in this case; which charge the court refused as asked, but charged as in the general charge; to which refusal of the court to charge, the counsel for the defendants excepted, and his exception was allowed and made part of the record in this case.

And the court charged the jury, as follows, which was all the charge of the court, except as above.

General charge.

If the jury believe from the evidence, that Fallis was the agent of the defendants to purchase grain in Illinois, and that he, as such agent, purchased the grain in question of the plaintiffs, the contract is binding on the defendants.

If, by the terms of the contract the grain purchased was to be delivered on board railroad cars, and the plaintiffs within the
56 time required by the contract, delivered on board railroad cars grain of the quality required by the contract, the defendants thereby became liable for the price.

If, by the terms of the contract the grain was to be subject to government inspection, the defendants are only liable for for so much of the grain as passed such inspection.

If the contract was for merchantable sacked corn, the defendants were not bound to receive any corn that did not answer that description.

If the defendants, by their acts and declarations to the plaintiffs, induced them to believe that Fallis was their agent to purchase grain, and the plaintiffs acting on such belief, sold the grain to Fallis, the contract would bind the defendants, although the relation of principal and agent might not in fact subsist between them and Fallis.

If Fallis was not the agent of the defendants to purchase
57 grain, and if the defendants did not by their acts and declarations induce the plaintiffs to believe he was their agent, the plaintiffs are not entitled to recover.

The written agreement between Fallis and the defendants of the date of August 13th, 1864, does not of itself constitute Fallis an agent of the defendants to purchase grain. Nor the declarations of Fallis to plaintiffs or other persons' proof that he was the agent of the defendants to purchase grain.

If in April, 1865, it was agreed between the plaintiffs and defendants that the corn in question should be subject to inspection by a Chicago inspector, the defendants are not liable for any of the corn that did and not pass such inspection.

By the law of Illinois, where the grain was sold, interest is and not recoverable on account for goods sold and delivered, unless there is an unreasonable and vexatious delay of payment.

If the jury find for the plaintiffs they may allow interest at
58 the rate of six per cent. if they also find that payment of the principal was unreasonably and vexatiously withheld.

Interest ought not to be allowed if the defendants believed they were not liable and therefore resisted payment.

It may be allowed if the defendants knowing or believing they had no defense to the demand refused payment.

All of which is signed, sealed, allowed and ordered to be made part of the record in the cause.

[SEAL.] S. H. TREAT.

Exhibit A.

$2,000. EL PASO, *January 30th*, 1865.

At (3) three days sight pay to the order of E. Fay & Co., two thousand dollars value received and charge the same to [the same to] account of, to O. P. Cobb, Christy & Co., Cincinnati,

E. FALLIS,
Ag't, No. 427.

Endorsed: E. Fay & Co., pay to the order of Dunlop & Co., or order. McClelland, Holden & Co.

Exhibit B.

CINCINNATI, *Dec.* 31, '64.

Mess. BATES, STONE & Co., Chicago, Ills.:

59 GENTLEMAN: Yours of 29th just received. We telegraphed you at once, saying, "telegraph E. Fallis, El Paso, giving location oats and to ship here on order." Mr. Fallis is our agent for buying grain and recently got a gov't order for transportation, which he can use in shipping these oats.

We telegraphed Mr. Fallis to same effect supposing the oats to be at Minouk.

Your telegram will give them the location, and we think there will be no trouble in shipping to Cincinnati.

We are glad to learn that you are succeeding in getting transportation. Gov't order has been sent you and we trust you have it ere this. Shove the oats along as fast as possible, as we are much in need of them.

Respectfully, yours,
O. P. COBB, CHRISTY & CO.
WELLER.

Exhibit "C."

Part of Wm. H. Snyder:

60 Question 12. You spoke of Fallis drawing drafts; please state upon whom these drafts were drawn; in whose favor; how they were signed; whether you received them or not, and how; what became of them and whether or not they were paid to you or your bank?

Ans. 12. The drafts were drawn upon O. P. Cobb, Christy & Co., of Cincinnati, and Cobb, Blaisdell & Co., of Cairo; they were drawn in favor of persons of whom he bought oats in Galena and neighborhood; they were all of them signed by E. Fallis, agent, and were forwarded by me to banker's in Cairo and Cincinnati, and collected.

I received these from persons from whom Fallis purchased the grain, sometimes for cash and sometimes for collection, according to the responsibility of the person presenting them.

Ques. 13. You spoke of a letter exhibited to you by Fallis. Please state the nature of that letter; how it was so exhibited to you?

Ans. 13. In the fall or winter of 1864, Mr. Fallis applied to
60 me to discount his draft on O. P. Cobb, Christy & Co., to the amount of several thousand dollars, upon representing himself as being their agent, in confirmation of which statement he produced a letter from O. P. Cobb, Christy, &c., authorizing him to draw upon them, and stating that his drafts would be paid. Not been acquainted with the parties, I declined discounting them, unless he would get an endorser in town, which he declined to do.

Ques. 14. Have you ever see that letter since?

Ans. 14. I have not.

Ques. 15. What became of it at that time?

Ans. 15. He took it away with him.

Exhibit D.

Part of John Faga's deposition.

30 Cross-ques. Do you know, or did you ever see a man by the name of Weller? If so, state when and where you saw him?

(Defendants' counsel objects to question.)

Answer. I saw a man of that name in Galena, Ills., representing himself as the agent of Cobb, Christy & Co., in April or May, 1865.

31st Cross-ques. Describe his personal appearance as near as you can?

62 (Defendants' counsel object to question.)

Answer. I guess he was a man about 5 feet 7 or 8 inch high; dark complexion; a stout man; broad shouldered.

32 Cross-ques. Did you see him more than once?

Answer. I saw him at 2 different times, and several times on those two occasions.

33d Cross-ques. State how long a period intervened between those two times you saw him here?

Answer. One or two weeks.

63 34th cross-ques. State now what he, Weller, said and did, when you saw him here respecting said oats purchased by Fallis.

(Defendant's counsel objects to question.)

Ans. He and Mr. Small, defendant's attorney came into my office. Mr. Weller asked me if I would not ship the oats into the Missouri river or to Cairo on a steamboat if he would get one to come.

I told him the oats were ready for three months for shipment, and could be shipped, as soon as the parties he represented furnished transportation, and paid for them; this was the first time he was here. The second time he was here, I met him at my office door; he asked me to come up stairs, that he wanted to see what Cobb, Christy & Co., and those parties, (that he represented,) owed Fagan &

Co. on the 40,000 bushels of grain; he went up stairs; I pulléd out the books, and showed him the books, and saw that E. Fallis owed Fagan & Co. over fifteen thousand dollars or more; he closed the book, and said he was sent here as an agent of those par-
64 ties that bought tae oats of us. "They don't want the oats, but they want the money that was advanced to you." He walked out of the house, after I gave him to understand that he could not get the money.

35 cross-ques. Were these two interviews with Weller before or after you were sued in the United States Court at Chicago, by O. P. Cobb, Christy & Co. for that money?

Ans. They were before I was sued.

36th cross-ques. State how long before you was sued that you had those interviews.

Ans. About one month.

37th cross-ques. Did Weller, at either of those interviews, demand the oats purchased of you by Fallis?

Ans. He did.

38th cross-ques. Did Weller, at either of those interviews, demand the $12,000 paid you in draftt by E. Fallis on those oats?

Ans. He did.

39th cross-ques. On whose behalf did he make those demands?
65 Ans. O. P. Cobb, Christy, and others.

40th cross-ques. Did Weller, at either of those interviews, or at the time he demanded the $12,000 dollars, state that the parties, that he represented, authorized him to get the money from your firm which had been advanced on those oats?

(Objected to by defendant's attorney.)

Ans. He stated that those parties sent him here to get the money, that was paid on those oats.

(Answer objected to by defendant's attorney.)

41st cross-ques. Have you stated all that Weller said and did on the two occasions you saw him here in Galena, Illinois, respecting the oats purchased of you by Fallis, and the money advanced thereon; if not, state anything further?

Ans. He said that if he would pay for the oats, Mr. McClosky would garnishee them, but that if I would ship them any place outside of the State, I would get my money.

42d cross-q. Did Weller, at any of those interviews, say
66 anything about E. Fallis? If so, state what it was.

A. He told me that he was sent in E. Fallis' place.

Exhibit E.

[2-c int. rev.]
[2-c int. rev.]
[2-c int. rev.]

Articles of agreement, made and entered into thirteenth day of August, 1864, by and between E. Fallis of Ohio of the first part, and O. P. Cobb, Christy & Co., of Cincinnati, O., of the second part, witnesseth:

That the said Fallis of the first part being well posted in the gran

trade in the States of Indiana, Illinois, and Iowa, and whereas the said Cobb, Christy & Co. of the second part have now and expect to have to furnish during the present season large amounts of grain to the United States government and others at Cincinnati, Louisville and Cairo:

Therefore the said Fallis hereby agrees to deliver grain to the said Cobb, Christy & Co. subject to inspection at the elevator or
67 railroad depots at the above-mentioned points, as follows:

The said Fallis to keep himself posted in the grain market, and report from week to week to the said Cobb, Christy & Co. what he can deliver them grain for at either of the points as specified above, carefully noting in his reports to the said Cobb, Christy & Co. what the grain will cost delivered, loaded in good order on the cars of the railroads leading to the cities mentioned, including the cost of transportation, and his profits of 1½ cents per bushel on grain when it is delivered, as above, at either of the points mentioned, Cincinnati, Louisville or Cairo, so as to notify said Cobb, Christy & Co. what he can deliver the grain for, and make to himself but one and one-half (1½) cents per bushel for what he delivers them according to contract within the time mentioned in his reports with the privilege of drawing on said Cobb, Christy & Co., Cincinnati, when the grain is loaded in good order on the cars of the railroads, as specified for an amount sufficient to pay near first cost of said grain, only
68 holding back sufficient amount of cost of said grain to indemnify said Cobb, Christy & Co. in paying freights to the places the grain is to be delivered, and to secure them against loss from short weights or bad grain, when delivered and inspected at the elevators or depots, as set forth above.

And it is further agreed that when said Fallis shall have made reports, setting forth what he can deliver grain for from time to time, at either of the points mentioned above, and said Cobb, Christy & Co. shall have agreed to accept any portion thereof, the said Fallis shall proceed at once to have the grain loaded on the cars, and draw when loaded, as authorized as above, and the grain so loaded shall be considered as contracted for, and belonging to the said Cobb, Christy & Co. except such portions of it as may be condemned on account of short weight or quality of grain at the place of final delivery.

That portion of said shipment shall be charged back by said
69 Cobb, Christy & Co. to said Fallis, and by him credited to said Cobb, Christy & Co.

And the said parties of the second part hereby agree to pay said party of the first part for such grain so delivered, for such portions of grain as reported as to cost delivered as above, including the one and one-half (1½) cent p'r bushel, reported as said Fallis' profits, on all grain the said Cobb, Christy & Co. accepts and the said Fallis delivers as agreed herein by him.

And the said Cobb, Christy & Co. further agree to make the first payment as the grain is hauled as above, and the balance from time to time as the grain is delivered, according to contract, and that they

will give said Fallis the preference in delivering the grain they may require whenever his reports of prices he will deliver at, at the different points, including his per cent. profits and time of delivery, does appear to be as advantageous to said Cobb, Christy & Co. as they can buy of other parties in the places of delivery; and in consideration of said Cobb, Christy & Co.'s advancing money on
70 grain when loaded on cars and billed to them, the said Fallis is to give them the refusal of all grain he buys during the season at the above rates, and to act as their special agent in forwarding all grain that we have paid money on, loaded on the cars under this agreement, to have the grain forwarded to the place of destination, and inspected soon as possible after it is loaded on the cars.

(Signed) E. FALLIS.
O. P. COBB, CHRISTY & Co.

Witness:
(Signed) H. B. WELLER.

We have carefully compared the above copy with the original agreement and find it to be a true and correct copy.

(Signed) H. V. CHRISTY.
RANKIN D. JONES.

"*Exhibit F.*"

CAIRO, *Dec.* 8, 1864.

ROB. FORSYTH, Esq., Chicago:

D'R SIR: We are informed by letter this morning from E. Fallis, our oats buyer at El Paso, that he is entirely unable to pro-
71 cure transportation for our oats at Dunleith.

He also says that Mess. Rumsey Bro's are furnished cars to the exclusion of all others.

We have purchased of different parties in Dubuque, Iowa, 130,000 bushels, and for which we need transportation.

These parties inform us that they will be compelled to dispose of their oats to other parties unless we can furnish them cars immediately.

If you can furnish a share of the cars at that point it will quiet the parties.

Pleas write us on receipt of this.

Yours.

COBB, BLAISDELL & CO.

"Exhibit F," (copy.)

Exhibit G.

CAIRO, *Dec.* 9*th*, 1864.

Col. WM. MYERS, Chief A. Q. M., Louis, Mo.:

D'R SIR: We have now on hand, ready for shipment, at Dunleith, 130,000 bushels oats.

Our purchasing agent informs us that he can get no trans-

72 portation, while other parties are supplied with all the cars they need.

Oats are not coming in here so as they have been, and we think the R. R. Co. will be amply able to furnish all the cars for the present needed by shippers.

We are anxious to have the oats at Dunleith come forward, and ask your assistance.

If you will request M. Forsyth to furnish us transportation for our oats at Dunleith, we think it will be all that may be necessary.

Yours, respectfully.

COBB, BLAISDELL & CO.

And the following endorsement appears upon the above-mentioned bill of exceptions: We have agreed to this bill ex. July 6th, 1867. Hendricks, Hord & Hendricks, att'ys for def'ts. Porter, Harrison & Fishback, for pl'ffs.

73 And afterwards, to wit, at the May term aforesaid of said court, on the 10th day of June, A. D. 1867, before the honorable Judge Davis aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Now come the defendants, by Mr. Hendricks, their attorney, and upon their prayer a writ of error to the Supreme Court of the United States is allowed upon their making and filing a proper bond, to be duly approved, in the penalty of twenty-five thousand dollars.

74 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the Circuit Court of the United States for the seventh circuit and district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea in the said Circuit Court, before you, between Emory Fay and Samuel L. Lord, plaintiffs, and Oliver P. Cobb, Thomas Folbre, Peter W. Williams, Louis Foulke, and James W. Christy, a manifest error hath happened, to the great damage of the said Oliver P. Cobb, Thomas Folbre, Peter W. Williams, Louis Foulke, and James W. Christy, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
75 with this writ, so that you have the same at Washington on the second day of December next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause to further be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

[SEAL.] J. D. HOWLAND,
Clerk U. S. Circuit Court dist. Ind'a.

76 UNITED STATES OF AMERICA, *ss*:

To EMORY FAY and SAMUEL L. LORD, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the seventh judicial circuit and district of Indiana, wherein Oliver P. Cobb, Thomas Folbre, Peter W. Williams, Louis Foulke, and James W. Christy are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Daniel Davis, one of the associate justices of the Supreme Court of the United States, this 12th day of June, in the year of our Lord 1867.

(Signed) D. DAVIS.

We acknowledge service of the citation herein. June 12, 1867.
(Signed) PORTER, HARRISON & FISHBACK,
Attorneys for d'f'ts in error.

77 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, John D. Howland, clerk of the United States Circuit Court in and for the district aforesaid, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record and proceedings in the above-entitled cause as fully as the same appear in my office, and that the original writ of error, citation and acknowledgment of service thereto are attached to said record, and that a bond is on file in my office, as required, on the allowance of said writ of error.

In testimony whereof I do hereunto set my hand and the seal of said court, at Indianapolis, this 19th day of August, 1867.

[SEAL.] J. D. HOWLAND.

Assignment of errors.

78 OLIVER P. COBB *et al.*
vs.
EMORY FAY, *et al.*

Error to the U. S. Circuit Court for the district of Indiana.

Counsel for plaintiff in error now comes and says that there was error in the record and proceedings of the United States Circuit Court for the district of Indiana in this case, in this, to wit:

1st. The court erred in admitting the letter of Weller to Bates & Stone, dated Dec. 31st, 1864, and objected to being exhibit marked "B" in the record.

2nd. The court erred in admitting answer to question 13, in chief, in Wm. Snyder's deposition, contained in exhibit "C" in the record.

3rd. The court also erred in admitting a portion of John Fagin's deposition, objected to, and found in exhibit "D" in the record.

4th. The court also erred in admitting Weller's declarations, referred to in to in the deposition of John Fagin, objected to, the same being contained in exhibit "D" in the record.

5th. The court also erred in admitting the letter written by Arrick to Rob't Forsythe, dated Dec. 8, '64, signed "Cobb, Blaisdell & Co,," same being exhibit marked "F" in the record.

6th. The court also erred in admitting the letter written by Mr. Arrick, signed Cobb, Blaisdell & Co., addressed to Col. Myers, dated Dec. 9th, 1864, and marked exhibit "G" in the record.

7th. The court also erred in refusing the charge asked by defendant's counsel, that the paper marked "E" did not constitute an agency for Fallis to purchase grain, being the Ist charge asked.

8th. The court also erred in refusing the charge asked by d'f'ts counsel about the holding out to the world of Fallis as agent, being the second charge asked as found in the record.

9th. The court also erred in refusing to give the charge asked by d'f'ts in relation to holding out Fallis to the world as agent, being the 4th charge asked by them, as found in the record.

79 10th. The court also erred in refusing the charge asked by the defendants in relation to Fallis' representations and also as to the use of the indefinite term "ag't," creating an estoppel, being the 5th charge asked by them, as found in the record.

11th. The court also erred in refusing the charge asked as to the use of the term "ag't," being the 6th charge asked by them, as found in the record.

12th. The court also erred in refusing the charge asked by defendants in reference to the purpose for which the corn was sold and the plaintiffs being bound to furnish such corn as was reasonably fit for that purpose, being the 7th charge asked by them.

13th. The court also erred in refusing to give the charge asked by defendants in reference to the agreement between them and plaintiff to submit to a Chicago inspector, being the 8th charge asked by them, as found in the record.

HENDRICKS, HORD & HENDRICKS
And LINCOLN, SMITH & WARNOCK,
Counsel for plaintiffs in error.